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No. 10,424

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN O. ENGLAND, Trustee of the Estate of John Nyhan, Bankrupt,

Appellant,

vs.

DAVID NYHAN,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

APPELLEE HAD SUCH POSSESSION OF THE TAXICAB PERMITS AS TO ENTITLE HIM TO A PLENARY SUIT.

In response to an order to show cause issued by the Referee in Bankruptcy on the 10th day of November, 1942, the Appellee, David Nyhan, on December 5, 1942, filed his verified plea to the Court's jurisdiction. (Tr. ff. 8 et seq.) The matter came on regularly for hearing on December 9, 1942, and after evidence produced by the Trustee and the Trustee having rested, the Referee sustained the Appellee's objection to the jurisdiction. (Tr. f. 19.)

In his petition for an order to show cause the Trustee alleged:

> "That said Respondent David Nyhan and Respondent bankrupt herein have joint possession

> and control of the above described taxi license, that Respondent David Nyhan now holds possession of said taxi license as agent and as trustee for said Respondent bankrupt." (Tr. f. 5.)

Assuming the foregoing allegation to be true, then unquestionably, in the absence of any objection, or assertion of an adverse claim on the part of Appellee herein, David Nyhan, the Court legally would have been entitled to hold that the Bankrupt's joint possession was sufficient, under the law, to enable the Court to pass upon, in a summary proceeding, David Nyhan's interest, if any, in the permit in controversy. However, the Bankruptcy Court could not ignore the statements made, under oath, by David Nyhan in his verified plea to the Court's jurisdiction, i.e.:

> "That before the petition in involuntary bankruptcy was filed in the District Court of the United States for the Northern District of California, Southern Division, the Respondent, David Nyhan, was and now is the owner and entitled to possession of that certain taxi license, issued by the Police Commission of the City and County of San Francisco, State of California, and mentioned in the Trustee's Petition. Any interest of the Bankrupt, James Nyhan, by reason of the issuance thereof in said Bankrupt's name in said taxi license is held in trust by said Bankrupt for Respondent, David Nyhan.
>
> "Respondent further alleges that the said Bankrupt, James Nyhan, has no ownership in said taxi license nor the possession thereof, and that said taxi license at no time was and not now is

a part of the assets of said bankrupt's estate." (Tr. f. 10.)

What was the evidence developed at the hearing?

The only witness called by the Trustee was the Bankrupt; not under Section 21a of the Bankruptcy Act but as his own witness and as a consequence the trustee was bound by the testimony of said witness:

> "Q. These documents, including your permit were returned to you by the Police Department, were they not?
>
> The Witness. A. They were returned to my brother. He was in possession of the permit since the time he arrived from the East. Sergeant Trainor would not turn it over to anybody but the one the permits were in, James Nyhan. I was there, my brother was there, we both received it." (Tr. f. 19.)

It will be noted that by brother the witness meant, the Appellee, David Nyhan, and that David Nyhan "returned from the East in 1939 or 1940". (Tr. f. 14.) The petition in involuntary bankruptcy was filed on December 2, 1941. (Tr. f. 18.)

It should be borne in mind at the outset that the burden of proof in the proceeding was on the Trustee to establish grounds for summary jurisdiction.

See

City of Long Beach v. Metcalf (C.C.A.), 103 F. (2d) 483.

Ordinarily the joint possession of the bankrupt, even with an adverse claimant, would justify the Court in

proceeding summarily, but that rule is inapplicable herein for the reason that David Nyhan having set up his adverse claim to the effect that said bankrupt is David Nyhan's agent, trustee or bailee, the Bankruptcy Court was bound by the rule that where one holds possession under the conditions claimed by David Nyhan, that the possession of the bankrupt is the possession of David Nyhan, and hence the Court is without jurisdiction in a summary proceeding to deal with the adverse claimant's purported interest in the license in question but must be adjudicated in a plenary action.

In the case of *Sproul v. Levin* (C.C.A.), 88 F. (2d) 866, in connection with summary proceedings, the Court said:

> "Hardly is there a question of law better settled than that a court of bankruptcy has no jurisdiction to hear and adjudicate in a summary proceeding a controversy as to title and ownership of property held adversely to the bankrupt estate and against the consent of the adverse claimant, and where such property came into the claimant's possession prior to the filing of the petition in bankruptcy, exceptions above set out excepted; but in such case, resort must be had by the trustee to a plenary action."

The only evidence the trustee produced was to the effect that the permits were in the name of the bankrupt, James Nyhan, at the time the bankruptcy proceedings were started. Appellee made that same allegation in his objections to the jurisdiction of the Bankruptcy Court as may be above noted, but the

said permits were held by the bankrupt as trustee for Appellee.

Here there is a clear cut controversy as to title to the permit held adversely to the bankrupt estate and such controversy must be heard in a plenary suit.

The Referee had preliminary jurisdiction to inquire into the nature of the defendant's possession and into any adverse claim so far as to see whether it is more than colorable. He made such inquiry and found he had no jurisdiction. This was in his discretion to do and such discretion cannot be disturbed on appeal unless there was a clear cut abuse thereof but which is not present in the instant case.

> "The fact that they assert an interest or title adverse to the bankrupt does not require a plenary proceeding, although of course the court in its discretion might direct the trustee to resort to such."
>
> *Chandler v. Perry* (C.C.A.), 74 F. (2d) 371.

Also in

> *Autin v. Piske* (C.C.A.), 24 F. (2d) 626, 627:
>
> "Of course, a claim may be adverse and substantial even though in fact fraudulent and voidable; but the referee is not bound by the mere statement of the claim, and may make a preliminary inquiry as to the facts to determine whether it is colorable. However, when the evidence develops that there is reasonable room for controversy, he must desist and remit the trustee to a plenary suit in a court of competent jurisdiction."

Also in

In re Bastarchury Corporation (C.C.A.), 62 F. (2d) at page 541.

"However, the court is not ousted of its jurisdiction by the mere assertion of an adverse claim; but having the power in the first instance to determine whether it has jurisdiction to proceed, the court may enter into a preliminary inquiry to determine whether the claim is real and substantial or merely colorable. And if found to be merely colorable the court may then proceed to adjudicate the merits summarily; but if found to be real and substantial it must decline to determine the merits and dismiss the summary proceedings" *Mueller v. Nugent,* 184 U.S. 15; *Taubel v. Fox,* 264 U.S. 433.

The Referee in the instant case found that the adverse claim of Appellee, David Nyhan, was real and substantial and even though such adverse claim be voidable, its voidability must be determined in a plenary proceeding. The Bankruptcy Court was adjudicated by the Referee not to be the proper tribunal to decide the issue upon the merits.

Appellant in his brief contends that because the permits were in the name of the bankrupt he therefore was the owner of them and entitled to the possession thereof and that such possession of the bankrupt was the possession of the Bankruptcy Court and that the Bankruptcy Court could summarily adjudicate upon them. But, the Appellee in his sworn objections to the jurisdiction alleged that he and not the bankrupt was the owner and entitled to possession of the permit and that any interest of the bankrupt, James Nyhan,

by reason of the issuance thereof in said bankrupt's name in the permit is held in trust by the bankrupt for Appellee, David Nyhan.

Let us assume that the bankrupt could not transfer the permit without the approval of the police commission. Let us also assume that any agreement between the bankrupt and the Appellee was therefore void. Under the doctrine of the case of *Autin v. Piske,* supra, such voidability must be determined in a plenary suit.

On behalf of the trustee, the complaint is made that because the trustee "did not submit the matter to the Court for its decision but rested on his affirmative and opening case the Court on the record could not have been fully advised as to the law and facts." (Tr. f. 22.)

It is quite evident that what seemingly is overlooked in this contention is the vital factor that the Court must decline jurisdiction as soon as the substantiality of the adverse claimant's claim is made to appear, and in this proceeding that substantiality appeared as soon as Appellee, David Nyhan's verified plea to the jurisdiction was placed before the Court, and the Trustee had ceased to present further testimony to show the jurisdiction in the Bankruptcy Court, so far as was and is concerned the summary determination of the rights of Appellee, David Nyhan.

See:

Benjamin v. Central Trust Co. (C.C.A. 7), 216 F. 887, 888, 889

wherein it is said:

> "The District Court may pursue the summary method to the point of ascertaining that the alleged adverse claim is substantial and not merely colorable. But substantiality appears as soon as the claimant, in response to the rule to show cause, presents his verified answer which is unmet by the trustee, or which, if met by replication, is supported by sworn testimony of facts which if true would show title and possession antedating the petition in bankruptcy. A conclusion that the alleged adverse claim is a cover for the claimant's possession as agent or bailee of the bankrupt cannot be permitted to be reached by the District Court's rejection of the sworn answer and testimony, and thereupon finding that the alleged adverse claim is fraudulent. That end can only be attained if it is the just conclusion of a due trial of a plenary suit."

It will be noted that the trustee did not call the Appellee to explain his verified plea to the jurisdiction. This he could have done under Section 21a of the Bankruptcy Act. So that under the decision of the above case Appellee's substantial claim that he was the owner and entitled to possession of the permit was not met by the trustee and the Bankruptcy Court could not proceed further but held that a plenary suit was necessary.

CONCLUSION.

1. The Bankruptcy Court did not abuse its discretion when it held that it did not have summary jurisdiction.

2. The possession of the permit by the Appellee was sufficiently alleged in Appellee's objection to the jurisdiction which was left unmet by the trustee.

3. The substantiality of the Appellee's adverse claim was found by the Referee to merit its being heard in a plenary suit.

It is therefore submitted that the District Court did not err in affirming the order of the Referee denying the summary jurisdiction and quashing the service of the order to show cause and we respectfully submit that this Honorable Court affirm the judgment of the United States District Court.

Dated, San Francisco,
September 22, 1943.

BERNARD NUGENT,
Attorney for Appellee.